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In the Supreme Court of the United States

OCTOBER TERM, 1957

MOE WEISE AND JAMES LESTER FRENCH, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (R. 166; Pet. App. A) is reported at 251 F. 2d 867.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1958 (R. 169; Pet. App. B). A petition for a rehearing was denied on March 10, 1958 (R. 170). The petition for a writ of certiorari was filed on April 7, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether information received through a telephonic F.B.I. report, and corroborated through the personal surveillance of F.B.I. agents, constituted probable cause for the agents to arrest petitioners in a moving vehicle on a public highway.

STATUTES INVOLVED

18 U.S.C. 3052 provides:

Powers of Federal Bureau of Investigation.

The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpœnas issued under the authority of the United States and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

18 U.S.C. (Supp. V) 1465 provides in relevant part:

Transportation of obscene matters for sale or distribution.

Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character,

shall be fined not more than $5,000 or imprisoned not more than five years, or both.

The transportation as aforesaid of two or more copies of any publication or two or more of any article of the character described above, or a combined total of five such publications and articles, shall create a presumption that such publications or articles are intended for sale or distribution, but such presumption shall be rebuttable.

* * * * * * * * *

STATEMENT

Following a trial before the court in the United States District Court for the Western District of Washington, petitioners were convicted on two counts of an indictment alleging the transportation of obscene material in interstate commerce from Portland, Oregon, to Tacoma, Washington, in violation of 18 U.S.C. 1465 (R. 3-4, 145). Petitioner Weise was sentenced to a term of imprisonment of four years on each count and to pay a fine of $5000, the terms to run concurrently (R. 157), and petitioner French to imprisonment for two years on each count, to run concurrently, and a fine of $2500 (R. 158). On appeal the judgment was affirmed (Pet. App. B).

Petitioners were arrested as they drove in an automobile through Tacoma, Washington, by agents of the Federal Bureau of Investigation not in possession of a warrant (R. 43-57, 72-73, 80, 82). In the car the agents found and seized boxes containing some 60,000 picture prints, several copies of books, and numerous reels of film and rubber images, the great mass of which was pornographic (R. 87-133, 137-138). Petitioners moved, before and during trial, to suppress the evidence, alleging that a warrant of arrest had

been illegally obtained by use of hearsay evidence and without probable cause (R. 5-7, 28-30, 134). The motion was denied (R. 30), the arrest being sustained as having been made upon probable cause (R. 139-143).

On the issue of probable cause to arrest without a warrant (R. 73), agent Ralston testified that, on the day of the arrest, at about 2:00 p.m. he was called to his Tacoma office to receive a telephone communication from a named Seattle F.B.I. agent (R. 75-76, 64). Ralston was told at this time that petitioner Weise, a known dealer in obscene photographs,[1] had left Los Angeles, California, two days earlier together with a man identified later as French, driving north in a 1955 Buick. Ralston was told that Weise had sold obscene photographs in Seattle a few months before and was investigated at that time (R. 66, 77). Weise had reportedly described the load in his car as "the real stuff"—"not just strippers". A detailed description of the car was given Ralston. He was also told that since the time of leaving Los Angeles, the car had been under the continued surveillance of fellow F.B.I. agents, and that packages were taken from it into business establishments in Oakland, San Francisco, and Sacramento reputedly dealing with obscene photographs and literature (R. 76-77). The car was reported to be then in Oregon.[2]

At 8:30 p.m., agent Ralston received another communication that the Buick car under observation was crossing a bridge into Washington from Oregon (R.

[1] Both petitioners had in fact records of arrest and conviction for activities involving obscene materials (R. 154).

[2] At trial, an F.B.I. agent of Portland testified as to similar stops made in Oregon and as to the car's entry into Washington (R. 33-38).

77). He set out with other area agents under his command in two official cars to take up surveillance of the Buick (R. 65). A few miles south of Olympia at about 10:00 p.m., he spotted the Buick and its pursuing cars (R. 66-67). He observed that petitioners sat in the front seat of the Buick, that brown cardboard boxes filled the rear interior almost to the level of the windows, and that the body of the Buick was low on the rear axle as if heavily loaded (R. 67-68, 77-78). At about the same time he received a radio communication that a complaint had been filed in Seattle, Washington, and a warrant of arrest issued there for petitioners (R. 78).[3]

Ralston joined the convoy of Bureau cars pursuing the Buick northward, meanwhile receiving periodic radio communications (R. 68, 69, 70). At Tacoma, Washington, he and the other agents in the convoy, acting under his orders, arrested petitioners and seized the pornographic materials (R. 70-71, 80, 82, 119, *et seq.*).

[3] At trial the government did not rely upon the warrant of arrest (although it was filed with the court (R. 135)) but merely offered evidence that Ralston was informed of its issuance just prior to the arrest as bearing on the issue of probable cause (R. 78). Petitioners, in renewing their motion to suppress at the conclusion of the government's testimony, asked for the admission into evidence of the complaint and the warrant, attacking their validity (R. 135, 19, 21). Neither the trial court nor the court below ruled specifically upon the validity of the warrant but rather concluded that the arrest of petitioners was properly made upon probable cause without a warrant and that a valid search was made incident to that arrest.

ARGUMENT

The sole issue here is whether there was probable cause to arrest petitioners under the circumstances of this case.[4] Petitioners contend that the officers could have arrested them on probable cause only after a determination to a certainty that every essential element of the statutory crime existed. In effect, they argue that, to establish probable cause, the degree and character of the evidence must be such as would be required to convict at trial. This is not in accord with established law.

This Court exhaustively treated the issue of probable cause in *Brinegar* v. *United States*, 338 U.S. 160 (following *Carroll* v. *United States*, 267 U.S. 132), where it pointed out that the existence of probable cause could not be measured by the application of technical evidential standards, particularly in cases involving moving vehicles, but must be determined through factual and practical considerations of everyday life on which reasonable and prudent men act. 338 U.S. 174-175. The facts of the instant case, we believe, provide an even stronger basis for a finding of probable cause than those in *Brinegar*.

Like *Brinegar* (and *Carroll*) the search here was of a moving vehicle on a public highway by federal officers charged with enforcing a statute prohibiting the trans-

[4] Petitioners persist in attacking the validity of the warrant of arrest, an issue which neither court below found necessary to consider in a determination of this cause. The record is clear that the government did not rely upon the warrant to justify the arrest of petitioners by an officer not in possession of it (see Rule 4(c)(3) of the Federal Rules of Criminal Procedure), but introduced testimony regarding its issuance solely as one of many factors bearing upon the issue of probable cause to arrest without a warrant (R. 73, 78).

portation (under certain conditions) of specified goods. As in those cases, the officers here knew that the car's driver had lately dealt with such goods. They not only knew that the identified car was stopping at, and proceeding in the direction of, probable markets for the prohibited goods but they had reliable specific information that it was loaded with the goods.

More specifically, here the officer ordering the arrest knew that the car, described to him in detail, was being driven by petitioners northward, loaded with what was believed to be pornographic material. The officer knew that petitioners had stopped many times en route to unload boxes at establishments reported to deal in pornography. He knew that the car had entered the State of Washington where, some few months earlier, its owner had sold obscene photographs. He personally observed that the car was heavily loaded with cardboard boxes. Without regard to any knowledge that he had respective to the issuance of a warrant, he had sufficient "reasonable grounds" for believing that a felony was being committed.

Petitioners argue (Pet. 14), again *contra* to the *Brinegar* decision, that agent Ralston could act only upon what he "saw through his own sensory organs" and not on the facts communicated to him. In *Brinegar*, the knowledge constituting probable cause was derived from personal observation and experience as well as facts of common knowledge and hearsay in the nature of general reputation. *Reliability* of the information was made the determinative factor. The Court, citing *Carroll*, *supra*, set out a definition of probable cause (338 U.S. at 175-176):

> Probable cause exists where "the facts and circumstances within their [the officers'] knowledge

> and *of which they had reasonably trustworthy information* [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. [Emphasis added.]

Here, even assuming that information gained by Ralston through an agency official report coming into his base of operation could for these purposes be termed hearsay, it could certainly not be termed unreliable. It was not based on surmise, or rumor, or evidence of general reputation, but upon an official investigation made after a report was received of Weise's previous activity in the state. It was channeled to Ralston through named agents and it was corroborated by a coastal network of official surveillance and the personal observation of Ralston and that of the other arresting agents.[5] It was information that would furnish reasonable grounds for an F.B.I. agent or any man of reasonable caution to believe that a crime was being committed. To require that all information providing the basis for probable cause come through one arresting agent's personal senses would preclude many modern methods of law enforcement.

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[5] Except for the one statement in the report that petitioner Weise had told someone in California that he had the "real stuff", it was not anonymous in any way, and the record before this Court does not show that petitioners requested the identity of the informer in this respect.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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